ROGER D. SCHOONOVER

IBLA 86-1635 Decided June 1, 1988

Appeal from a decision of the California State Office, Bureau of Land Management, denying petition for deferment of annual assessment work. CA MC 130836, et al.

Affirmed.

1. Mining Claims: Assessment Work

The preliminary injunction issued by the court in National Wildlife Federation v. Burford, 676 F. Supp. 271 (D.D.C. 1985), modified, 676 F. Supp. 280 (D.D.C. 1986), is not a legal impediment which affects a mining claimant's right to enter upon the surface of his claim in order to perform assessment work, where that claim was located in 1983 following the 1983 revocation of a withdrawal and restoration of the land to the operation of the mining laws. A petition for deferment of assessment work on such a claim, which is based upon that injunction, is properly denied.

APPEARANCES: Roger D. Schoonover, pro se.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Roger D. Schoonover has appealed from a decision of the California State Office, Bureau of Land Management (BLM), dated September 11, 1986, denying his petition for deferment of annual assessment work with respect to various lode mining claims located by him between July 23 and August 27, 1983, in secs. 19 and 20, T. 33 N., R. 7 W., Mount Diablo Meridian, Shasta County, California. 1/ The land included in the mining claims in question had been opened, effective July 23, 1983, to the location of mining claims

1/ The claims involved in this appeal are the Bucky Nos. 6, 13, 21 through 24, 26 through 29, and 31 through 39 (CA MC 130836, CA MC 133715, CA MC 130845 through CA MC 130848, CA MC 133718 through CA MC 133721, and CA MC 133723 through CA MC 133731, respectively). Schoonover also holds other Bucky claims.

by Public Land Order (PLO) No. 6402 (48 FR 30119 (June 30, 1983)), which, effective that same date, revoked various Department and BLM orders. 2/

Schoonover filed timely notices of location of the claims for recordation with BLM and in 1984 and 1985 filed either affidavits of assessment work or notice of intent to hold the claims. On August 25, 1986, Schoonover filed a petition for the deferment of annual assessment work for the claims explaining that he had recently become aware that the land encompassed by the claims was involved in a suit initiated on July 15, 1985, by the National Wildlife Federation (NWF) against the Department and that "[b]ecause of the position of the BLM in regards to this action it is doubtful if my title to this mineral right will be upheld [regardless] of the amount of additional development work I might do." Accordingly, Schoonover requested the deferment of assessment work for the 1986 assessment year "or until the BLM can again give assurance that they can sustain my legal ownership of the Bucky Claims." Schoonover noted that assessment work had already been done with respect to some of the Bucky claims and that the petition was only with respect to those claims for which assessment work had not been done.

In its September 1986 decision, BLM denied Schoonover's petition for the deferment of annual assessment work stating that the preliminary injunction issued in connection with the NWF suit "does not impede claimants from performing assessment work." BLM further stated: "Casual use and notice-level operations may continue on all mining claims, mill sites, and tunnel sites as they do not require BLM approval. Timely annual filings for assessment work and notices of intention to hold will be accepted by BLM." BLM specifically advised Schoonover that he could file a notice of intent to hold for the 1986 assessment year. Schoonover has appealed from that BLM decision. 3/

In his statement of reasons for appeal, appellant essentially contends that he should be granted a deferment of assessment work because the NWF lawsuit effectively prevents the performance of that work necessary to realistically develop the claims, rather than to simply comply with the assessment work requirement. Appellant asserts: "The reality is that as long as the lawsuit is in effect there is no rational way that anyone would invest money necessary to get the work done."

2/ PLO No. 6402 specifically revoked Departmental order dated Nov. 16, 1932, and BLM orders dated June 10, and Aug. 10, 1948, Feb. 27, 1952, and Mar. 12, 1956, which had withdrawn land, including all of sec. 19 and the S 1/2 of sec. 20, T. 33 N., R. 7 W., Mount Diablo Meridian, Shasta County, California, for the Bureau of Reclamation's Central Valley Project in the Trinity-Whiskeytown area.

3/ The record indicates that, on Sept. 16, 1986, Schoonover filed with BLM a notice of intention to hold the claims covered by his petition for deferment.

Following the location of appellant's mining claims, NWF filed suit in Federal district court on July 15, 1985, challenging the Department's termination of classifications and revocation of withdrawals which had taken place on or after January 1, 1981, as inconsistent with the Department's statutory obligations. In conjunction with that suit, NWF filed a motion for a preliminary injunction. The district court granted the motion and enjoined the Department in a December 4, 1985, memorandum opinion. National Wildlife Federation v. Burford, 676 F. Supp. 271 (D.D.C. 1985). The district court stayed its preliminary injunction on December 16, 1985. However, on February 10, 1986, it denied reconsideration of the injunction and modified the injunction to clarify that it applied only to the Federal defendants, not third parties, and that post-1981 terminations and revocations were suspended, not voided. National Wildlife Federation v. Burford, 676 F. Supp. 280 (D.D.C. 1986). The court indicated that annual mining claim filings were still required, but that this did not permit the Department "to authorize mining activity." Id. at 284. Section 1(b) of the court's injunction specifically enjoined the approval of any plan of operations. The United States Court of Appeals for the District of Columbia Circuit affirmed the issuance of the preliminary injunction. National Wildlife Federation v. Burford, 835 F.2d 305 (D.C. Cir. 1987).

In order to interpret and implement the court's February 1986 preliminary injunction, the Solicitor issued a memorandum to all Assistant Secretaries and Bureau Directors on March 10, 1986. The Solicitor particularly discussed the effect of the preliminary injunction on mining claims. With respect to mining claims located after the segregative effect of a withdrawal or classification had been lifted, the Solicitor interpreted the court's injunction to mean that the "claims remain valid but the Order applies and the Department may take no further action, including the approval of plans of operations" (Solicitor's Memorandum, dated Mar. 10, 1986, at 4). The Solicitor added that the Department was permitted to accept filings required by FLPMA in order that a claimant could "protect his or her rights." Id. at 5.

[1] It is now well established that, in order to be entitled to a deferment of the performance of the statutorily-required annual assessment work pursuant to 30 U.S.C. § 28b (1982) and 43 CFR 3852.1, a mining claimant must generally establish that there is a legal impediment which affects the claimant's right to enter upon the surface of his claim. 4/ Lyra-Vega II

4/ The statutory provision authorizing the deferment of annual assessment work specifically states that the

"performance of not less than $ 100 worth of labor or the making of improvements aggregating such amount * * * may be deferred by the Secretary of the Interior as to any mining claim or group of claims in the United States upon the submission by the claimant of evidence satisfactory to the Secretary that such mining claim or group of claims is surrounded by lands over which a right-of-way for the performance of such assessment work has been denied or is in litigation or is in the process of acquisition under State law or that other legal impediments exist which affect the right of

Mining Association, 91 IBLA 378, 381-82 (1986), and cases cited therein. We conclude that there is no such impediment in the present case. 5/

In the case of performance of assessment work, no Departmental authorization is necessary where anticipated operations either constitute casual use, as defined in 43 CFR 3809.5(b), or would not disturb an area in excess of 5 acres and would be conducted in accordance with 43 CFR 3809.1-3. 43 CFR 3809.1-4; see Differential Energy, Inc., 99 IBLA 225 (1987). Thus, in precluding the approval of plans of operations, but in leaving intact the mining claim annual filing requirement, the court effectively allowed Departmental acceptance of affidavits of assessment work subject only to the limitation that such work consist of those operations which need not be authorized by the Department. The Department has also interpreted the court's February 1986 memorandum opinion as not precluding the performance of assessment work. In particular, the Director, BLM, stated in Instruction Memorandum (IM) No. 86-355, dated April 1, 1986, at page 4:

> All notices of intent to hold and all evidence of annual assessment work will be accepted by BLM for all mining claims and sites of record. Since they do not require BLM approval, casual use and notice-level operations may continue on all mining claims, mill sites, and tunnel sites. [6/]

The conclusion to be derived from this analysis is that appellant was not precluded from performing assessment work for the 1986 assessment year by virtue of the district court's preliminary injunction. Nor was appellant's entry on his mining claims for the purpose of performing assessment work prohibited or impaired in any way by that injunction. While the injunction creates an air of uncertainty regarding development of the claims, it does not constitute a legal impediment which affects the claimant's right to enter upon the surface of his claim, within the meaning of 30 U.S.C. § 28b (1982). As we said in Continental Oil Co., 36 IBLA 65, 68 (1978): "[T]he mere pendency of litigation involving mining claims,

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fn. 4 (continued)
the claimant to enter upon the surface of such claim or group of claims or to gain access to the boundaries thereof."
30 U.S.C. § 28b (1982).

5/ In this case, appellant located his claims prior to the court's February 1986 preliminary injunction. In Chester Reddeman, 101 IBLA 33 (1988), we held that the injunction suspended the termination of a small tract classification which had segregated the land from mineral entry, and that a mining claim located on such lands after the date of the injunction, as modified, was null and void ab initio.

6/ The term "notice-level operations" clearly refers to operations which do not disturb an area in excess of 5 acres and are conducted in accordance with 43 CFR 3809.1-3, including notice to the pertinent authorized BLM officer. See 43 CFR 3809.1-1. Moreover, the reference to "all mining claims" is limited in certain circumstances to mining claims located on the date of or prior to the court's February 1986 memorandum opinion. See note 5, supra.

which gives rise to a risk that any assessment work invested in the claims may be lost as a consequence of an unfavorable court decision, is an insufficient basis to support a petition for deferment of assessment work." See also Charlestone Stone Products, Inc., 32 IBLA 22 (1977); Portland General Electric Co., 29 IBLA 165 (1977). We conclude that BLM properly denied appellant's petition for the deferment of annual assessment work.

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Anita Vogt
Administrative Judge
Alternate Member